BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

DIETRICH W. SCHODDE Claimant	)	
VS.	)	Docket No. 1,006,218
SOUTHWESTERN BELL TELEPHONE CO. Self-Insured Respondent	)	

ORDER

Respondent requested review of the April 14, 2006, Award by Administrative Law Judge Brad E. Avery. The Board heard oral argument on August 8, 2006.

APPEARANCES

John M. Ostrowski, of Topeka, Kansas, appeared for the claimant. Douglas R. Sell of Olathe, Kansas, appeared for the self-insured respondent.

RECORD AND STIPULATIONS

The Board has considered the record and adopted the stipulations listed in the Award.

ISSUES

The Administrative Law Judge (ALJ) appointed Dr. James Warren to provide ongoing pain management to claimant and ordered respondent to provide that care within the limitations of the Workers Compensation Fee Schedule. The ALJ found that claimant was entitled to a work disability. However, the ALJ also found that claimant failed to exercise good faith in becoming re-employed and imputed a wage of $340 per week. The ALJ found that claimant had a wage loss of 67 percent and a task loss of 49.95 percent. An average of the wage loss and task loss computed to a work disability of 58.47 percent. The ALJ deducted 8 percent from that figure for preexisting permanent partial impairment, which made claimant's work disability 50.47 percent. The ALJ also found that claimant had a functional disability of 20 percent based on the opinion of Dr. Peter Bieri, the court-appointed independent medical examiner (IME).

The respondent argues that the ALJ should have found a greater percentage of claimant's injuries to be preexisting. Respondent contends that the ALJ should not have averaged the two task losses in this case because the task list of Dick Santner is flawed; therefore, only the task loss opinion of Dr. David Clymer using Monty Longacre's task list should be used, if any. In assessing claimant's wage loss, respondent argues that claimant did nothing to maintain his eligibility for a job with respondent and, although claimant stated he looked for delivery work in 2004, that is unsupported by any compelling evidence. Respondent argues that claimant did not establish that he had made a good faith effort to obtain or retain appropriate employment. Respondent (incorrectly) states that the ALJ imputed the lowest wage put forth by the vocational experts in imputing claimant's wage loss and argues that, instead, the ALJ should have determined that claimant could have earned $12 per hour based on testimony by Monty Longacre. Respondent further argues that the claimant voluntarily took himself out of the open labor market and therefore should be limited to his percentage of functional disability for his neck and left upper extremity injuries only. Respondent finally asserts that the ALJ erred by ordering ongoing pain management with Dr. Warren because it should retain the right to control claimant's medical treatment. Respondent points out that Dr. Clymer testified that no future specific treatment is anticipated for claimant.

Claimant refers to the ALJ's award as "minimally correct"[1] but argues that the ALJ erred in splitting the task loss opinions of Drs. Clymer and Koprivica. Claimant argues that Dr. Clymer's opinion should be disregarded because it is out of line with the overall record. In the alternative, claimant contends that the restrictions recommended by the court-appointed IME, Dr. Bieri, were similar to the restrictions of Dr. Koprivica so their task loss opinions would have been the same. Claimant asserts that, accordingly, the split of the task loss opinions should have been among the opinions of Dr. Koprivica (66.7 percent), Dr. Bieri (66.7 percent) and Dr. Clymer (33.33 percent). Divided by three, this would constitute a task loss of 55.55 percent. Claimant also argues that his best earning power is $330 per week for a wage loss of 68.1 percent. Averaging this with the task loss of 55.55 percent, this would compute to a work disability of 61.83 percent. Claimant also argues that the ALJ should have awarded payment of all reasonable past medical treatment associated with his neck and left upper extremity injuries.

In his submission letter to the ALJ, claimant limited his claim of work-related injuries to aggravations of preexisting conditions in his left upper extremity and cervical region. Claimant specifically excluded any claim for disability to his ankle, low back, or for fibromyalgia or any psychological component to his disability. It appears that except for the left ankle, claimant is likewise excluding any claim for medical treatment for these conditions.

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[1] Claimant's Submission Brief to the Appeals Board, filed July 10, 2006, at 2.

> Claimant is not claiming permanent injury to his left ankle. Claimant is not claiming his low back problems are directly related to the admitted accident. Claimant is not claiming that he suffers fibromyalgia as a result of the on-the-job injury. Claimant is not claiming that his present inability to work is solely traceable to the injury. Claimant is not claiming a psychological component directly traceable to the July 2002 accident and series of accidents. While some of these things may indeed be traceable, medical science is currently unable to support that proposition.[2]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the evidentiary record filed herein, the stipulations of the parties, and having considered the parties' briefs and oral arguments, the Board makes the following findings of fact and conclusions of law:

Claimant was 42 years old at the time of his accident and had worked for respondent as a supply attendant for 21 years. In that capacity, he would deliver intercompany mail, supplies, and equipment to respondent's affiliates throughout the state. On July 12, 2002, claimant slipped and fell while getting out of his truck. At first, claimant was only aware that he had twisted his left ankle. That injury resolved, but within a week or two after his fall claimant noticed that his left hand and arm had swollen and that he had pain in his neck, left shoulder, and low back. Respondent required that he go to the emergency room at St. Francis Hospital for workers compensation injuries, and he went sometime between one to two weeks after his accident. Claimant testified that he was told to wear a sling for his arm, but he told the hospital personnel that his neck also hurt. Claimant went to the emergency room a second time on July 31, at which time he was given a five-pound weight restriction and was taken off work. While he was off work, his job was eliminated by respondent as a part of a reduction in force, and claimant has not returned to any work since July 31, 2002.

Claimant admits previously being diagnosed with carpal tunnel syndrome, he thought in 1995. A workers compensation claim was filed for this, and he was off work for three months. He also admitted that he had filed workers compensation claims at least four times for injuries to his low back. He had pain in his neck area a few months before his accident, and an MRI performed on February 14, 2002, revealed a superimposed tiny disc protrusion or herniation at the C4-C5 level, and some bilateral foraminal narrowing, greater on the left than on the right. Claimant states that the fall on July 12, 2002, aggravated his neck and low back conditions, as well as his carpal tunnel syndrome. However, in his Application for Hearing, claimant named a date of accident as a "series from approximately 2/1/02 thru 7/26/02 & a definitive accident and/or aggravation on

[2] Claimant's Submission Brief to the Administrative Law Judge, filed April 11, 2006, at 1-2.

7/12/02."[3] At the Regular Hearing, Judge Avery announced that the parties had stipulated to an accident date of July 12, 2002.[4]

Claimant had been seeing Dr. Parminder Chawla, a neurologist, for over a year before his fall for problems with restless leg syndrome and for his neck problems. After this workers compensation claim was denied by respondent, claimant returned to Dr. Chawla with complaints about his hands. Dr. Chawla ordered an EMG, which showed mild to moderate carpal tunnel syndrome. Dr. Chawla treated claimant for his carpal tunnel syndrome and referred claimant to Dr. Joseph Sankoorikal for his neck problems. Claimant had carpal tunnel release surgery on his left wrist in 2003, but his right wrist was not as bad as his left and the doctor opted not to do surgery on the right. In addition, Dr. Sankoorikal sent him to physical therapy.

Claimant claims he has not been able to work since he was taken off work in July 2002. Claimant had 90 days after he was laid off to try to get a different job at respondent. At his deposition in October 2002, claimant was asked whether he had talked to anyone at respondent about getting a job, and he indicated that he had not. He also indicated that he was not going to talk to anyone from respondent within that 90-day period. However, there is no evidence in this record that respondent could have or would have accommodated claimant's restrictions and returned him to work. There is likewise no evidence concerning what wage claimant could have received had he returned to work with respondent.

Claimant said that two or three days a week he is lethargic and "out of it."[5] He said he could work if he had an employer that would let him come to work at his discretion. He testified that in 2004 he applied for jobs at four businesses but was not called back for any interviews. These are the only places he has applied to work. He is attempting to get Social Security disability but, as of the Regular Hearing, had not been approved. He is trying to establish an orchard on his property and has 18 trees. He testified that the trees are small and do not require much care.

Claimant's primary care physician referred him to Dr. James Warren, a specialist in physical medicine and rehabilitation, in order to improve claimant's function and try to get him back to work. After reviewing claimant's films and performing a physical examination, Dr. Warren opined that claimant had degenerative arthritis in both his neck and back and carpal tunnel syndrome on the left. Claimant also had fibromyalgia, restless leg syndrome, insomnia, and depression. Dr. Warren prescribed pain medication and muscle relaxants, and sent him to physical therapy. Dr. Warren continues to treat

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[3] Form K-WC E-1 Application for Hearing filed September 24, 2002.

[4] R.H. Trans (Dec. 12, 2005) at 4.

[5] Schodde Depo. (Sept. 14, 2005) at 30.

claimant. He believes there is a causal connection between claimant's pain and his depression. He has never discussed claimant's workers compensation claim with him. Accordingly, Dr. Warren did not relate any of these conditions to claimant's work. Nevertheless, Dr. Warren did testify that there is some medical literature that suggests physical trauma can cause, aggravate, accelerate, or intensify fibromyalgia. Dr. Warren's testimony establishes that claimant is in need of ongoing treatment, pain management in particular. His testimony does not establish that this treatment is directly traceable to claimant's work injuries. However, that connection is proven by the record taken as a whole. As respondent had not designated a physician to provide ongoing pain management, Judge Avery's order that Dr. Warren is authorized to continue treating claimant is affirmed.

Dr. P. Brent Koprivica is board certified in occupational medicine. He performed an examination of claimant on June 28, 2005, at the request of claimant's attorney. In asking claimant about his claimed series of microtraumas, claimant complained of problems with his neck and left upper extremity, including numbness in his left hand. Claimant also complained of progressive low back pain. He gave a history of carpal tunnel syndrome on the left side.

Dr. Koprivica found that claimant had moderately severe carpal tunnel syndrome for which he had been treated surgically on the left and for which he had residuals, including decreased left hand grip. He felt claimant had reached maximum medical improvement (MMI) in regard to the wrist. He assigned a 20 percent upper extremity impairment rating for moderate carpal tunnel syndrome based on the AMA *Guides*.[6] This converts to a 12 percent whole person impairment.

Dr. Koprivica reviewed the MRI of the cervical spine taken February 14, 2002. In examining claimant's cervical spine, Dr. Koprivica found that he had pain and limited motion of his neck. He diagnosed claimant with chronic cervical pain with a history of cervical radiculopathy. Claimant's cervical spine condition was at MMI, and Dr. Koprivica assigned a Category III diagnosis related estimate (DRE) impairment based on the AMA *Guides*. He rated claimant's permanent partial impairment at 15 percent to the body as a whole for his cervical spine. He stated that at least 80 percent of this impairment predated the fall in July 2002. However, he did not say if claimant's preexisting condition constituted a rateable impairment under the AMA *Guides* before the accident which is the subject of this claim.

In examining claimant's low back, Dr. Koprivica found some reduction of range of motion in the low back. He did not diagnose a lumbar radiculopathy because he could not validate it. Based on the AMA *Guides*, Dr. Koprivica rated claimant as having a DRE

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[6] American Medical Association, *Guides to the Evaluation of Permanent Impairment* (4th ed.). All references are based upon the fourth edition of the *Guides* unless otherwise noted.

Category II 5 percent permanent partial impairment to the body as a whole for his low back. On cross-examination, Dr. Koprivica stated that claimant did not relate to him that his low back pain had been caused by the fall in July 2002 but that it was related to repetitive lifting at his job.

Using the Combined Values Chart in the AMA *Guides*, Dr. Koprivica opined that claimant had a 29 percent permanent partial impairment to the body as a whole.

In regard to the low back, Dr. Koprivica recommended claimant avoid frequent or constant bending at the waist, pushing, pulling, twisting, and sustained or awkward postures of the lumbar spine.

Dr. Koprivica reviewed the task list prepared by Mr. Santner and opined that claimant was unable to perform four of the five tasks listed, for an 80 percent task loss. In his deposition, however, Dr. Koprivica stated he would add one more task, driving, and testified that he would give that task a yes and no answer because claimant could physically drive, but he should not be driving with the medication he is on. The Board, therefore, finds Dr. Koprivica eliminated five of six tasks for an 83.33 percent loss.

Dr. David Clymer, a board certified orthopedic surgeon, examined claimant on November 7, 2005, at the request of respondent. Dr. Clymer stated that claimant's description of his complaints was vague and diffuse. Claimant complained of discomfort in every part of his body. Dr. Clymer testified that because of the multitude of claimant's complaints, he should avoid very heavy lifting, and he recommended a lifting limit in the range of 60 to 70 pounds. Accordingly, when reviewing the task list of Mr. Santner, he opined that claimant would be unable to perform two of the six tasks because of the lifting requirements for a 33.33 percent task loss. In reviewing the task list prepared by Monty Longacre, Dr. Clymer believed that claimant would be unable to perform three of the nine tasks listed, unless the lifting involved in those tasks was less than 70 pounds, for a 33.33 percent task loss.

In reviewing the medical records of Dr. Warren, Dr. Clymer stated that they reinforced his opinion that claimant has a variety of chronic generalized pain problems. Dr. Clymer stated that although claimant had a wide variety of subjective complaints, the objective findings are limited.

Dr. Clymer felt claimant had a 10 percent permanent partial impairment of the left upper extremity due to carpal tunnel disease. He opined, however, that 8 percent of that was a longstanding gradual progressive preexisting process and 2 percent was the result of the July 2002 fall. In regard to claimant's neck, Dr. Clymer believed that claimant had a 5 percent permanent partial impairment of the cervical spine as a result of work-related aggravation to his cervical spine. His ratings are based on the AMA *Guides*.

Although under the DRE Category III, claimant would have a 15 percent permanent partial impairment because of his cervical condition, Dr. Clymer reduced that to 5 percent for two reasons. First, he thinks the AMA *Guides* are guidelines, not to be used as a one-size-fits-all. With regard to claimant, Dr. Clymer felt his objective findings were on the mild end of the spectrum. Second, it was difficult for him to assess claimant's preexisting condition because everything hurt.

Dr. Clymer believed that claimant's fibromyalgia and carpal tunnel disease preexisted his July 2002 accident, although the carpal tunnel syndrome may have been aggravated. He also stated that his findings suggested chronic degenerative changes in claimant's neck, although that may have been aggravated by the accident. He also opined that claimant's low back problems were the result of aging and gradually progressive degenerative changes. Dr. Clymer did not give an impairment rating on claimant's low back.

Dr. Clymer agreed that there was no objective evidence of radiculopathy before the July 2002 accident. Dr. Clymer also agreed that it is possible that claimant's work activities, over a long period of time, would contribute to claimant's carpal tunnel syndrome.

Because of the disparity in the ratings of Drs. Koprivica and Clymer, the ALJ appointed an IME, Dr. Bieri, to examine claimant. Dr. Bieri found that as a result of the July 2002 fall, claimant had cervical strain and subsequent left C-6 radiculopathy that aggravated his preexisting disease. Dr. Bieri also found that claimant aggravated his left carpal tunnel syndrome.

Using the AMA *Guides*, Dr. Bieri rated claimant with a 15 percent whole-person impairment for DRE Cervicothoracic Category III. He opined that 5 percent of this rating was preexisting, with 10 percent attributable to the injury of July 12, 2002. Dr. Bieri also rated claimant as having a 10 percent left upper extremity impairment for residuals of entrapment neuropathy at the level of the left wrist. This converted to a 6 percent whole-person impairment. Dr. Bieri opined that 3 percent of this 6 percent rating was attributable to the injury in July 2002. The combined whole-person impairment attributable to the injury of July 2002 was 13 percent. The Board agrees with the ALJ that Dr. Bieri's functional impairment opinions are the most credible and, therefore, respondent has proven claimant had an 8 percent preexisting impairment for the conditions that are the subject of this claim.

Dr. Bieri did not believe that claimant's complaints concerning his low back met the criteria for additional permanent partial impairment as a result of the July 2002 injury. In addition, claimant's right carpal tunnel symptomatology, fibromyalgia, and restless leg syndrome were not attributable to his work-related injury.

Dr. Bieri did not give an opinion on task loss. However, he concluded that claimant met the general physical demand level of light-medium and recommended that claimant

limit occasional lifting to 40 pounds, frequent lifting not to exceed 20 pounds, and no more than 10 pounds constant lifting. He also recommended that repetitive gripping, grasping, and handling involving the left upper extremity should be performed no more than occasionally to frequently. K.S.A. 44-510e(a) requires that task loss be "in the opinion of the physician." Therefore, it would serve no purpose for the Board to speculate as to what tasks Dr. Bieri's restrictions would eliminate.

Dick Santner met with claimant on December 2, 2003, at the request of claimant's attorney, and prepared a list of the tasks claimant performed in the 15 years before his injury. Although he originally listed five tasks, at his deposition Mr. Santner added driving as a separate task, since claimant, at times, drove considerable distances.

Based on the information contained in Dr. Koprivica's report and the restrictions placed on claimant by Dr. Koprivica, Mr. Santner opined that claimant would be able to earn in the range of $7 to $8 per hour if he returned to work. Mr. Santner admitted that claimant did not have a lot of transferable skills. He did not have any idea whether claimant had been looking for a job and did not discuss job-searching efforts with claimant during their interview.

Monty Longacre met with claimant on February 7, 2006, at the request of respondent. He prepared a list of nine nonduplicated tasks that claimant had performed in the 15 years before his injury. At the time of this interview, claimant was not working and was demonstrating a 100 percent wage loss. Claimant told him he did not believe he was able to work. He was not registered at Job Service. Mr. Longacre tried to discuss with him the Heartland Work Program and State Vocational Rehabilitation Programs, but claimant was not interested. Mr. Longacre believed that $9 per hour would be the top wage claimant would be able to obtain. He testified that the $9 figure was a simple mathematical calculation, and he said that a judge could impute a wage ranging from $5.15 per hour to $9 per hour.

Mr. Longacre went over with claimant some jobs available in the paper that he thought claimant might be able to do, including a home assembly job, such as jewelry making. There was also a job as a sales clerk/cashier at $9.69 per hour and another at $7.50 per hour. There was a temporary position in customer service and sales at $12 an hour. There was a position as an assistant manager of an apartment complex that paid $9.50 per hour. Dominos was looking for assistant manager trainees at $9 per hour, and Electric Cowboy was looking for help at $9 per hour. It is not known whether claimant applied for any of those jobs, but claimant told Mr. Longacre he was not interested. At the time claimant's Regular Hearing testimony was taken on December 12, 2005, which was before he met with Mr. Longacre, claimant had not applied for any work and said he did not believe he was able to work.

Permanent partial disability under K.S.A. 44-510e(a) is defined as the average of the claimant's work task loss and actual wage loss. But, it must first be determined that

a worker has made a good faith effort to find appropriate employment before the difference in pre- and post-injury wages based on the actual wages can be used. If it is determined that a good faith effort has not been made, then an appropriate post-injury wage will be imputed based upon all the evidence, including expert testimony, concerning the capacity to earn wages.[7]

Claimant obviously failed to make a good faith job search after he reached maximum medical improvement and was released with permanent work restrictions. Accordingly, a post-injury wage will be imputed to claimant. The Board agrees with the ALJ's conclusion that claimant is capable of earning approximately $340 per week and, therefore, has a wage loss of 67.14 percent. The ALJ averaged the task loss opinions of Dr. Koprivica and Clymer. The Board likewise finds both opinions to be credible. Averaging Dr. Koprivica's 83.33 percent task loss using the modified task list of Mr. Santner, with the 33.33 percent task loss given by Dr. Clymer using Mr. Longacre's task list, results in a task loss of 58.33 percent. Averaging this task loss percentage with the 67.14 percent wage loss results in a percentage of 62.74. After subtracting the 8 percent preexisting impairment, the Board finds claimant's work disability is 54.74 percent

AWARD

WHEREFORE, it is the finding, decision and order of the Board that the Award of Administrative Law Judge Brad E. Avery dated April 14, 2006, is modified to award claimant a 54.74 percent permanent partial disability and payment of past medical treatment expenses of claimant's ankle, left upper extremity, and neck injuries, subject to limitations in the fee schedule, but is otherwise affirmed.

Claimant is entitled to 227.17 weeks of permanent partial disability compensation at the rate of $432 per week or $98,137.44 for a 54.74 percent work disability, making a total award of $98,137.44.

As of October 12, 2006, there would be due and owing to the claimant 221.86 weeks of permanent partial disability compensation at the rate of $432 per week in the sum of $95,843.52 for a total due and owing of $95,843.52, which is ordered paid in one lump sum less amounts previously paid. Thereafter, the remaining balance in the amount of $2,293.92 shall be paid at the rate of $432.00 per week for 5.31 weeks or until further order of the Director.

The Board notes that although the record contains the fee agreement between claimant and his attorney, the ALJ did not award claimant's counsel a fee for his services.

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[7] *Parsons v. Seaboard Farms, Inc.*, 27 Kan. App. 2d 843, 9 P.3d 591 (2000); *Copeland v. Johnson Group, Inc.*, 26 Kan. App. 2d 803, 995 P.2d 369 (1999), *rev. denied* 269 Kan. 931 (2000); *Oliver v. Boeing Co.*, 26 Kan. App. 2d 74, 977 P.2d 288, *rev. denied* 267 Kan. 889 (1999).

K.S.A. 44-536(b) mandates that attorney fees for services rendered to claimant be reasonable as determined by the Director. Should claimant's counsel desire a fee for his services provided in this matter, then a request for the same should be presented to the ALJ.

IT IS SO ORDERED.

Dated this _____ day of October, 2006.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

c: John M. Ostrowski, Attorney for Claimant
Douglas R. Sell, Attorney for Self-insured Respondent
Brad E. Avery, Administrative Law Judge